JD–104–04
Peoria, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HH3 TRUCKING, INC., GRETCHEN HUDSON, An Individual, WILLIAM HUDSON, An Individual

and Case 33—CA—14374

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 325

Nicholas M. Ohanesian, Esq. and *Mark L. Stolzenburg, Esq.,* for the General Counsel.
Gretchen Hudson, of Rockford, Illinois, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This is a supplemental compliance proceeding for the purpose of determining the backpay due four employees found by the National Labor Relations Board (Board) to have been unlawfully discharged by HH3 Trucking, Inc. (the Company) in its March 18, 2004[1] Order[2] adopting the January 20 bench decision of Administrative Law Judge Ira Sandron).[3] A compliance specification and notice of hearing naming the Company and its owners and principal officers, Gretchen Hudson and William Hudson (the Hudsons), issued on July 19. Respondents filed their answer on August 9.

A hearing was conducted in Peoria, Illinois, on August 18, at which all parties were afforded full opportunity to be heard, produce evidence, and examine and cross-examine witnesses. Two of the discriminatees—Arthur Johnson Jr. and Keith Candley—testified. Additionally, the General Counsel called Greg Ramsay, the Board's Regional compliance officer, concerning preparation of the compliance specification and its methodology. The Company was represented by the Hudsons. The parties were given the opportunity to submit briefs by September 17. The General Counsel filed a brief, but Respondents did not.

The objective in a compliance case is to restore the discriminatees to the *status quo ante*, as much as possible, to the circumstances that would have existed had the respondent's unfair labor practices not occurred. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998); *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 20 (1990). While the General Counsel bears the burden of proving the amount of gross backpay due, it is impossible to know with absolute certainty exactly what an individual discriminatee would have earned had he continued working for the respondent during the backpay period. As such, it is well-settled Board policy that a backpay

[1] All dates are from December 2003 to September 2004 unless otherwise indicated.
[2] GC Exh. 1(l).
[3] GC Exh. 1(k).

specification is legally sufficient if the methodology it used was not unreasonable or arbitrary under the circumstances. *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943); *Performance Friction Corp.*, 335 NLRB 1117, 1118 (2001); *La Favorita, Inc.*, 313 NLRB 902 (1994). Any uncertainty over how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent. *Alaska Pulp Corp.*, *supra* at 522; *Ryder/P*I*E* Nationwide*, 297 NLRB 454, 457 (1989), enfd. in relevant part 923 F.2d 506 (7th Cir 1991). An employer may reduce or eliminate its backpay liability by showing that a discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). However, this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (5th Cir. 1966); *Atlantic Limousine*, 328 NLRB 257, 258 (1999); A*BC Automotive Products Corp.*, 319 NLRB 874, 877 (1995); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 551 (1978).

Based upon the entire record, including the Board's Order, Judge Sandron's bench decision, testimony of witnesses, and my observations of their demeanor, documents and stipulations of the parties, I make the following

Findings of Fact

I. Background

The Company is an Illinois corporation engaged in the business of hauling construction materials in dump trucks. It is owned and managed entirely by the Hudsons, and operated out of their home. Gretchen Hudson serves as the Company's president, while William Hudson serves as vice-president. The Hudsons dispatch dump trucks owned by the Company and driven by its employees. They also dispatch trucks owned by others (owner operators).[4]

In the underlying unfair labor practice case, Judge Sandron found that the Company, through the Hudsons, violated Section 8(a)(1) by threatening discharges and plant closure, and violated Section 8(a)(3) by discharging employees Arthur Johnson Jr., Joseph Downey III, Keith Candley, and Dennis Tenner in retaliation for their union activities. The Company was ordered, inter alia, to offer the discriminatees full reinstatement to their former jobs and make them whole for any loss of earnings and other benefits they may have suffered due to Respondents' unlawful discrimination against them, with interest.[5] On December 9, pending the final disposition of the underlying case before the Board, the Honorable Philip G. Reinhard of the United States District Court for the Northern District of Illinois issued a temporary injunction pursuant to Section 10(j) of the Act.[6] On March 18, the Board adopted Judge Sandron's findings and conclusions.[7] However, a dispute arose between the parties concerning backpay and a compliance specification and notice of hearing issued.

II. Backpay Issues

A. The General Counsel's Methodology

Ramsay credibly testified regarding the preparation of the compliance specification, the source of factual information on which it is based and the rationale for the methods used to

[4] GC Exh. 1(k) at 5.
[5] GC Exh. 1(k) at 23–24.
[6] GC Exh. 1(j).
[7] GC Exh. 1(l).

compute gross backpay. As the discriminatees were truck drivers, he calculated the gross backpay for each discriminatee on a quarterly basis by relying on the Company's daily truck records and invoices. Ramsay summarized the information in charts A-1 through A-9. Those charts list the trucks used, the days they were used and number of hours that each truck was driven each day.[8] The charts also state the total number of hours that each truck was used during each quarter of the backpay period.[9] Utilizing the average hours worked per week during each quarter and an hourly wage rate of $15, Ramsay compiled charts B-1 through B-4 to determine the gross hours of backpay due to each discriminatee.[10] The General Counsel's method of calculation was consistent with the Board's longstanding practice of calculating gross backpay on a quarterly basis. *F.W. Woolworth Co.*, 90 NLRB 289, 292–293 (1950). Ramsay then calculated net backpay for each discriminatee on a quarterly basis by subtracting any income earned during that period of time—net interim earnings—from gross backpay.

Respondents did not challenge the methodology used by the General Counsel, but contend that the Company did not have a truck for Downey to drive because truck no. 31 was out of operation during 2003.[11] However, the Company's truck records and invoices indicated that truck no. 31 operated on several occasions from September to November.[12] They also indicated that several drivers drove different trucks before and during the backpay period.[13] Furthermore, Downey's credited testimony in the underlying proceeding established that Gretchen Hudson had assured him he would be driving either the Company's trucks or owner-operated trucks as long as he wanted.[14]

B. The Backpay Periods

While the General Counsel has the burden of proving gross backpay, Respondents have the burden of proving they effectively ended the backpay period by making valid offers of reinstatement to the discriminatees. Such offers "must be specific, unequivocal, and unconditional." *Adsco Manufacturing Corp.*, 322 NLRB 217, 218 (1996).

Candley's backpay period began on June 30, 2003, the date of his unlawful discharge. The period ended October 9, 2003, when the Company offered reinstatement and he declined the offer. Downey's backpay period began June 28, 2003, the date of his unlawful discharge, and ended January 21, 2004, when the Company offered reinstatement and he failed to respond. Johnson and Tenner's backpay periods began on June 23 and August 7, respectively, on the dates of their unlawful discharge. Their backpay periods ended April 6, 2004, the date they returned to work for the Company.

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[8] GC Exh. 1(m) at A-1 to A-9.

[9] The General Counsel utilized only records for trucks owned by the Company as opposed to owner operators who worked for the Company, but owned their own vehicles. GC Exh. 2–3. Due to the lack of cooperation from the Company during the compliance investigation, the General Counsel reasonably relied on records obtained from the Company's customers. Tr. 123–131; GC Exh. 7–10.

[10] The charts were generated by Ramsay and accurately reflect truck hours on a weekly and quarterly basis. GC Exh. 1(m) at B-1 to B-4. Truck no. 31 was omitted from the calculations because it was sparingly used in the third and fourth quarters of 2003. In addition, as 38.1 percent of the invoices for the fourth quarter of 2003 were missing, Ramsay multiplied the weekly average for the fourth quarter of 2004 by a factor of 1.381.

[11] Tr. 203; R. Exh. 9.

[12] GC Exh. 42–43.

[13] GC Exh. 40; R. Exh. 8.

[14] GC Exh. 1(k) at 8.

Gretchen Hudson asserted that she made offers of reinstatement in December, but was unable to produce receipts.[15] She also attributed the delays in reinstating the discriminatees to an alleged requirement that they take mandatory drug tests. Again, she failed to produce any documentary evidence to support her claim.

C. Backpay Calculations

During the backpay period, Candley credibly testified that he obtained a job delivering ice. He worked an average of 40 hours per week from mid-July to September 27. The total amount of net interim earnings during the backpay period was $5280, resulting in net backpay of $4093.50. Gretchen Hudson asserted that Candley underreported interim earnings, but her evidence actually corroborated the General Counsel's proof.[16]

Johnson's net backpay was $16,562.25 as there were no interim earnings to offset gross backpay during the backpay period.[17] Johnson credibly testified that he made reasonable efforts to find work during the backpay period, including monthly visits to the union hall. He applied for employment at over 25 employers between the time of his termination in June 2003 and his reinstatement on April 6, 2004. Despite these efforts, Johnson was unable to obtain employment except for 1 day of employment by another trucking company. However, the trucking company terminated Johnson after 1 day because Gretchen Hudson threatened to withhold work from that company if it continued to employ Johnson.[18] On cross-examination, Gretchen Hudson asked Johnson how he was able to buy a new home if he was unemployed. Johnson credibly explained that his wife was working two jobs.

Downey's gross backpay for the second and third quarters of 2003 was $8975.25. That sum was offset by net interim earnings of $3360.00, resulting in net backpay of $5615.25. However, the fourth quarter of 2003 and first quarter of 2004 backpay calculations were entirely offset by net interim earnings.[19] Tenner's net backpay was $12,274.88 as there were no interim earnings to offset gross backpay during the backpay period.[20]

I do not credit Gretchen Hudson's unsupported testimony that Johnson and Candley either underreported earnings or did not make sufficient efforts to find employment after they were discharged. They provided credible testimony regarding their efforts to find employment, while Gretchen Hudson's contentions were limited to unfounded assertions relating to drug testing and the cost of owning a home. Accordingly, I find that the Respondents have not sustained their burden of showing that Johnson, Downey, Candley, and Tenner did not "make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966).

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[15] It appears that Gretchen Hudson was referring to her mailing of copies of the temporary injunction issued by the district judge. Tr. 149, 218; GC Exh. 1(j). However, that document neither contained nor constituted an offer of reinstatement.

[16] GC Exh. 1(m), B-1; R. Exh. 10.

[17] GC Exh. 1(m) at B-3.

[18] Gretchen Hudson did not deny making such a threat, but disputed the actual words used during her conversation with the trucking company manager. Tr. 260–261.

[19] GC Exh. 1(m) at B-2.

[20] GC Exh. 1(m) at B-4.

III. The Financial Relationship Between the Respondent and the Hudsons

The General Counsel contends that the Company's corporate veil should be pierced and the Hudsons held jointly and severally liable because they freely commingled the assets of the Company with their own. At trial, Gretchen Hudson asserted that such relief is not appropriate because it is a family-owned business operating out of her home and many of the expenses cited were attributable to company operations.

Under the Federal common law standard followed by the Board, the corporate veil may be pierced when "(1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *White Oak Coal Co.*, 318 NLRB 732 (1995).

A. The Failure of the Company and the Hudsons to Maintain Separate Identities

In determining whether the shareholders and corporation have failed to maintain separate identities, the Board will consider generally both "the degree to which the corporate legal formalities have been maintained, and the degree to which individual and corporate funds, other assets, and affairs have been commingled." *White Oak Coal Co.*, 318 NLRB at 735. In analyzing the maintenance of such formalities and commingling of assets, the Board will consider the following factors:

> (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or under capitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

Id. at 735.

Although requested by the General Counsel, the Hudsons failed to produce any evidence indicating that they operated the Company as a separate entity, maintained any corporate records, complied with corporate legal formalities and maintained an arm's-length relationship from the Company. To the contrary, the General Counsel demonstrated that the Hudsons have steadily commingled their personal assets with those of the Company and used it as a conduit to subsidize their personal and household expenditures. Gretchen Hudson admitted that she used the Company's checking account to pay for personal expenses,[21] but asserted that some of the expenses highlighted by the General Counsel, such as the purchase of an air cleaner[22] and payments for internet service,[23] bore some relationship to the Company's operations. However, the rest of the itemized expenses clearly benefited the Hudsons only in their individual capacities.

Gretchen Hudson conceded that Respondents never produced any of the Company's credit card statements as requested in the subpoena duces tecum issued by the General

[21] Tr. 69; GC Exh. 35 at 2.
[22] Tr. 73–74; GC Exh. 14.
[23] Tr. 84–85; GC Exh. 18.

Counsel during the compliance investigation.[24] Nevertheless, copies of the Company's checking account statements provide overwhelming support for the General Counsel's contention that Company funds are a consistent form of subsidy to the Hudson household.[25] During the period of October 2003 to June 2004, the Hudsons wrote Company checks to pay their home mortgage,[26] make large church contributions,[27] purchase men's clothing, pay Sears mastercard bills, [28] Bank One credit card bills,[29] utility bills, television satellite service, home garbage service, and purchase groceries, vitamins, and pharmaceutical products.[30]

The commingling of funds also demonstrated the undercapitalization of the Company. Gretchen Hudson used company funds to pay her home equity line of credit, but asserted that she used such funds to pay employee salaries whenever necessary.[31] She also made undocumented loans to the Company, but made no provision for repayment.[32] Additional evidence of undercapitalization was evident from the Company's checking account statement, which revealed that it incurred overdraft fees on at least five occasions between January and June 2004.[33]

The integration and intermingling of the Hudsons' personal assets and affairs with that of the Company demonstrate that no distinct corporate lines existed. See, *Douglas Electrical Contracting, Inc*., 2002 WL 31844642, slip op. at 3-4 (2002) (piercing of corporate veil appropriate because respondents "regularly and continuously commingled their personal funds, assets and affairs with those of [the companies] . . . [and] [t]here were no corporate records kept of the personal checks, deposits in the same account and the commingling of monetary transactions and corporate assets)"; *Flat Dog Productions, Inc*., 2003 WL 22844182, slip op. at 4 (2003) (corporate veil pierced because assets were commingled and respondent moved between his individual and corporate officer roles without regard to corporate distinctions or ceremony).

B. Adherence to the Corporate Structure Would Promote Injustice or Lead to the Evasion of the Respondent's Legal Obligations

As the Supreme Court noted in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003), the piercing of the corporate veil "is the rare exception, applied in the case of fraud or certain other exceptional circumstances . . . and usually determined on a case-by-case basis." In this case, the Hudsons were responsible for the Company's unfair labor practices. They maintained exclusive ownership and control of the Company. Although there is no evidence of fraud on their part, there is overwhelming evidence that the Hudsons misused the corporate structure by diverting Company assets for personal use. In doing so, they failed to maintain any corporate records to justify this commingling of personal and Company finances. Moreover, they continued this practice after they were on notice of the Company's pending backpay liability. The consequence of the Hudsons' actions in blurring the Company's separate identity and misusing its assets is the diminished ability of the Company to satisfy its remedial and backpay

[24] Tr. 101; GC Exh. 11.
[25] GC Exh. 14–30.
[26] Tr. 94–95; GC Exh. 29.
[27] Tr. 241.
[28] Tr. 91–92; GC Exh. 25(a)–(b).
[29] Tr. 97.
[30] Tr. 82–83; GC Exh. 17.
[31] Tr. 238.
[32] Tr. 245.
[33] Tr. 86; GC Exh. 15, 19.

obligations. Under the circumstances, it is clear that "adherence to the corporate form would result in injustice and would lead to an evasion of legal obligations." *A.J. Mechanical, Inc. Williams A. Greene*, 2002 WL 31962796, 10 (2002). Applying this analytical framework, I conclude it is appropriate to pierce the corporate veil and hold Gretchen and William Hudson jointly and severally liable for the Company's remedial and backpay obligations.

Conclusions of Law

I find that the backpay calculations are appropriate. Respondents have not sustained their burden of showing that there should be any additional offsets. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

Respondents, HH3 Trucking, Inc., its officers, agents, successors, and assigns, and Gretchen Hudson and William Hudson, jointly and severally, shall pay to each of the following employees as net backpay, the amount set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and State laws:

Arthur Johnson Jr.	$16,562.25
Joseph Downey	$5,615.25
Keith Candley	$4,093.50
Dennis Tenner	$12,274.88

Dated: Washington, D.C. October 25, 2004

Michael A, Rosas
Administrative Law Judge

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.